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IN THE

Supreme Court of the United States

OCTOBER TERM, 1974

No. 74-1350

UNITED ORDER OF AMERICAN BRICKLAYERS AND STONE MASONS, LOCAL 21, *Petitioner,*

vs.

WILLIAM A. WATERS AND DONALD SAMUELS, AND WISCONSIN STEEL WORKS OF INTERNATIONAL HARVESTER COMPANY, *Respondents.*

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

BRIEF OF RESPONDENTS WILLIAM A. WATERS AND DONALD SAMUELS IN OPPOSITION.

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Petitioner Union raises four questions for this Court's consideration.

QUESTION 1:

Does 42 U. S. C. § 1981 forbid racial discrimination in private employment; if so, does it prohibit discriminatory practices other than the refusal to hire on the basis of race?

ANSWER:

Yes. In *Johnson* v. *Railway Express Agency, Inc.*, ... U. S. ....., ..., 95 S. Ct. 1716, 1920 (1975) the Court stated

that "it is now well settled among the federal courts of appeals —and we now join them—that § 1981 affords a federal remedy against discrimination in private employment on the basis of race." Also, in *Johnson, supra,* 95 S. Ct. at 1717-18, this Court recognized that § 1981 is directed "to most of the same ends as Title VII," including a private employer's discriminatory "seniority rules and job assignments" and a union's racially segregated memberships, all of which were in issue in *Johnson.*

QUESTION 2:

Does 42 U. S. C. § 1981 require the recall of a black worker who had not been discriminated against in hire over white workers who have a greater period of service for the employer, where none of the affected employees have a contractual right to be recalled?

ANSWER:

The question simply does not arise on record in this case. One question raised below was whether a 1966 amendment to a severance pay agreement negotiated by petitioner and Wisconsin Steel Works in 1965 violated the rights of respondents Waters and Samuels. That amendment restored seniority rights to a group of all-white past employees, who by accepting severance pay had lost their recall rights with the company, and reinstated them *ahead* of a group of black bricklayers. But for this amendment, the black bricklayers would have been recalled first. On this point the trial court found:

> Defendants' June 15, 1966 agreement to amend the earlier severance pay agreement and thereby restore recall rights to an all white group of bricklayers who otherwise possessed no recall rights under the prior severance pay agreement, *thereby placing those white bricklayers ahead of black bricklayers,* constitutes a violation of both § 1981 and Title VII. (App. 28a)[1] (Emphasis added)

1. For a full exposition of the facts, see the pending Petition for Certiorari filed by Waters and Samuels, No. 74-1064. Citations are to the appendix of that Petition.

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The Seventh Circuit affirmed the finding as it affected Mr. Waters. (App. 17a). Petitioner simply overlooks these findings and the uncontested facts that underlie them.

QUESTION 3:

May a union be found jointly liable with an employer for a violation of 42 U. S. C. § 1981 because the union was a party to a provision of a collective bargaining agreement which was racially neutral on its face, but was found illegal because the employer had previously engaged in racial discrimination in hire, where the union did not participate in the hiring?

ANSWER:

After the trial of this cause, the district judge found that respondent Local 21 was a party to a collective bargaining agreement and to a 1966 amendment to that agreement, both of which perpetrated the effects of past discriminatory practices. The trial court then awarded plaintiffs back pay and attorneys' fees "from the defendants Wisconsin Steel and Local 21." (App. 28a). Defendant Local 21 filed a motion under Rule 59, F. R. Civ. P., to amend the judgment. However, the Union's motion challenged only the finding that it was liable at all, and not the trial court's apportionment of damages.

On cross-appeals to the Seventh Circuit, petitioner Local 21 again failed to challenge the district court's appointment of liability and damages. The Seventh Circuit found that the Union was liable. The Seventh Circuit affirmed[2] the finding that the 1966 amendment to the collective bargaining agreement which restored seniority rights to white bricklayers who had accepted severance pay and thereby placed them ahead of respondent

2. The Seventh Circuit found that "last hired, first fired" seniority provision contained in the collective bargaining was immune from challenge under Title VII and therefore also immune under § 1981, and thus reversed that portion of the district court's judgment. The correctness of that decision has been challenged by respondents Waters and Samuels in their pending Petition for Certiorari, No. 74-1064.

Waters for purposes of recall was discriminatory. Also, the Seventh Circuit affirmed the conclusion of the trial court that "the union was an integral party to the June 1966 amendment which discriminated against Waters." The court thus adopted the trial judge's conclusion that "Local 21 * * * shares jointly in the liability of Wisconsin Steel." (App. 17a-18a).

The apportionment of liability was within the discretion of the trial judge. See *Barnett* v. *Grant*, ... F. 2d ....., 9 EPD § 10,199 (4th Cir. 1975); *Johnson* v. *Goodyear Tire & Rubber Co.*, 491 F. 2d 1364 (5th Cir. 1974). Having never suggested to the trial judge that the apportioned damages in any manner other than jointly, and having failed to appeal the joint apportionment of damages by the district court, respondent is now foreclosed from asking this Court to apportion damages in a different manner.

QUESTION 4:

If 42 U. S. C. § 1981 forbids racial discrimination in private employment, is the appropriate statute of limitations in a suit for back pay the residual statute of limitations of the State in which the alleged violation occurred?

ANSWER:

According to the teachings of this Court in *Johnson, supra*, 95 S. Ct. at 1721, the controlling statute of limitations for actions brought under § 1981 is "the most appropriate one provided by state law." After careful analysis of the available limitation provisions under Illinois law, the Seventh Circuit found the most appropriate statute to be Ill. Rev. Stat. Ch. 83 § 16 (1967) governing civil actions not otherwise provided for. *Waters* v. *Wisconsin Steel Wks. of International Harvester Co.*, 427 F. 2d 476, 488 (1970).

Petitioner nowhere suggests that the statute of limitations adopted by the Seventh Circuit is not the most appropriate one provided by Illinois law. Nor does petitioner suggest that the

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five-year limitations period is "inconsistent with the federal policy underlying" § 1981. See, *Johnson* v. *Railway Express Agency, supra,* 95 S. Ct. at 1722. Petitioner merely observes that different circuits have adopted different state limitations statutes. That result, however, is not surprising inasmuch as the statutory schemes of each of the 50 states differs substantially. Absent a showing that the statute adopted below is not the most appropriate statute or that it is inconsistent with the federal policy underlying § 1981, there is no basis for review by this court.

CONCLUSION.

Each of the questions posed by petitioner either have been answered by the Court or do not arise on this record. For these reasons, the Petition for Certiorari should be denied.

Respectfully submitted,

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